BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals, Eighth Circuit, in this, the law action, is not yet officially reported, but is set out on pages 231 to 272 of the record filed herein. (See Law Case Record No. 11,492.)

The opinion of the same Court in the preceding equity suit is reported in 97 F. (2d) 896.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals, Eighth Circuit, affirming the judgment of the District Court for the Eastern District of Missouri, was entered on August 2, 1940 (Law R. 231), and the petition for rehearing was denied on August 22, 1940 (Law R. 274). Thirty days stay of mandate was granted on September 9, 1940 (Law R. 274).

The following cases are believed to sustain the jurisdiction of this Court:

Erie R. R. v. Tompkins, 304 U. S. 64;
Ruhlin v. New York Life Ins. Co., 304 U. S. 202;
Lyon v. Mutual Ben. H. & A. Co., 305 U. S. 484;
Wichita Royalty Co. v. City Natl. Bk., 306 U. S. 103.

III.

STATEMENT OF THE CASE.

Under the heading "A" in the petition ante is a statement of the case so far as it is material to the consideration of the question presented, and in the interest of brevity is not repeated here.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals, Eighth Circuit, erred in holding that, under the undisputed facts as disclosed by the opinion itself, plaintiff had made a case of "vexatious delay" for the jury. Under the controlling Missouri decisions there was no vexatious delay as a matter of law.

V.

ARGUMENT.

The sole question in the case was whether or not plaintiff had made a case of "vexatious delay" for submission to the jury.

This question arose in an action in Missouri on a policy of insurance delivered in Missouri, and hence a Missouri contract, testing the force and effect of the Missouri "vexatious delay" statute.

The question in issue was, therefore, to be determined by Missouri law.

Being determinable by the law of Missouri as announced by the highest court of that state (the Supreme Court), the Court of Appeals was bound to decide that question in

accordance with the decisions of the Supreme Court of Missouri.

Erie R. R. v. Tompkins, 304 U. S. 64;
Ruhlin v. New York Life Ins. Co., 304 U. S. 202.

The Missouri statute in question is as follows (Section 5929, R. S. Mo. 1929):

> "*Damages, when recoverable.* In any action against any insurance company to recover the amount of any loss under a policy of fire, cyclone, lightning, life, health, accident, employer's liability, burglary, theft, embezzlement, fidelity, indemnity, marine or other insurance, if it appears from the evidence that such company has vexatiously refused to pay such loss, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed ten per cent on the amount of the loss and a reasonable attorney's fee; and the court shall enter judgment for the aggregate sum found in the verdict."

In construing and applying this statute the Supreme Court of Missouri has held that if the defendant, at any time before the trial, had reasonable grounds to believe that, because of a conflict, or a reasonable expectation of conflict, *as to the facts*, or because of a reasonable difference of opinion *as to the law* the question of its liability was doubtful, then the defendant is entitled to freely litigate the question of liability, whether growing out of fact or law, and its refusal to pay before the question is judicially determined is not vexatious. On any other basis the statute would be unconstitutional.

Or, stated otherwise, under the decisions of the Missouri Supreme Court, there is no "vexatiousness" and there is no case made for submission to the jury *if*

(a) There is a bona fide conflict of fact,

or

(b) There is a question of law involved about which lawyers might well differ.

Thus speak the controlling cases:

In Aufrichtig v. Columbia National Life Ins. Co., 298 Mo. 1, l. c. 16:

> "It will not do to say that insurance companies, acting in good faith, may not contest *either an issue of fact or an issue of law* without subjecting itself to the penalties of the statute."

In State ex rel. Continental Life Ins. Co. v. Allen, 303 Mo. 608, l. c. 620:

> "An insurance company's right to resist payment upon one of its policies cannot be determined by the facts as found by the jury but must be determined by the facts as they reasonably appeared to it before trial. It has the right to refuse payment and to defend a suit with all the weapons at its command, so long as it has reasonable grounds to believe its defense is meritorious."

In State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo. 1078, l. c. 1095:

> "The legal questions raised by the respondent's petition were such that lawyers might well differ, honestly and reasonably, thereon. *In these circumstances it was error to submit the question of vexatious delay* (Dolph v. Maryland Casualty Co., 303 Mo. 551-2, 261 S. W. 330; Aufrichtig v. Columbia Nat. Life Ins. Co., 298 Mo. 15-16, 249 S. W. 912; State ex rel. v. Allen, 295 Mo. 319, 243 S. W. 839)."

As to (a) Conflict of Fact.

The conflict of *fact* was whether or not Calhoun had a hemorrhage on November 2, 1933. The evidence indisputably showed that the company, *at the time of trial* of the equity case, had before it these facts:

1. The letter of Dr. Seabold, of December 20, 1935, advising the company that:

> "*On November 2, 1933,* he had a moderately severe *gastric hemorrhage.*" (See Law R. 128.)

2. The letter and report of Dr. Harris, of February 21, 1936, advising the company that:

> "He (Dr. Seabold) next saw him *on November 2, 1933,* because of a *gastric hemorrhage,* evidenced by nausea and vomiting of blood" (Law R. 150).

3. The deposition of Dr. Seabold himself, in which he said:

> "*He had had a gastric hemorrhage;* at any rate, he had vomited blood; that was 10 p. m., *November 2d, 1933*" (Law R. 116).

The defendant in the equity case contended that there was no hemorrhage on November 2, 1933. *Whether or not there was a hemorrhage on that day was the controverted question of fact.* If yes, the insurance company had laid the basis of its right to cancel the contract.

The question before the Court of Appeals in the law action was whether or not there was a bona fide question of fact on this subject.

In view of the foregoing facts which the opinion of the Court of Appeals concedes, it indisputably appeared that there *was* a bona fide dispute of fact, and, therefore, under the test which the Court itself properly adopted from the Missouri decisions, there was not and could not be any vexatious refusal to pay. The insurance company was contesting the policy upon indisputable and uncontradicted documentary evidence. Even if the fact of hemorrhage vel non on November 2, 1933, was disputed, there was certainly and indisputably *a conflict* on that point, and the

contest of this issue of fact was most certainly made in good faith. If there be a good-faith contest, there is no "vexatiousness" as a matter of law. The question is simply *not submissible to the jury.*

As to (b) Dispute of Law.

The equity suit presented at least a *debatable* question of law—a question about which lawyers might well differ.

That question was this: If *in fact* Calhoun died from a disease of the blood vessels, and if *in fact* he had this disease before he signed his application, his *knowledge* of the disease was immaterial. Under the facts in this case it was undisputed that he did have this disease before he signed the application and did die of this disease of the blood vessels. Therefore, under the following decisions, which were the controlling law of the case when tried, it was unnecessary to show actual knowledge:

> Kirk v. Metropolitan Life Ins. Co., 336 Mo. 768;
> Kern v. Supreme Council, 167 Mo. 471;
> Burgess v. Pan-American Life Ins. Co., 230 S. W. 315 (Mo.).

The trial court in the equity case even went so far as to *specifically declare* that under the *Missouri law* as announced in the *Kirk case,* supra, *an innocent misrepresentation,* concerning a matter which contributed to insured's death, would avoid the policy, and that *the insurer was not required* to show that such misrepresentation *was knowingly untrue* (Rec. Equity, page 18). This is what the trial court in the equity case said, in its conclusions of law:

> "The *Missouri rule* now *is* that if an applicant for insurance states in his application that he has no physical deformity or disease, and if thereafter he dies of such deformity or disease and it is learned that he had the same before and at the time of the making of said application, then his statement is to be treated

> as a misrepresentation and avoids the policy, *even though the insured was perfectly innocent of any intention to commit a fraud and had no knowledge of the existence of* the deformity with which he was afflicted (Kirk v. Metropolitan Life Ins. Co., 81 S. W. [2d] 333)" (Rec. Equity, page 18).

The circumstance that the rule, as thus announced by the Missouri Supreme Court in the Kirk case, supra, was *later* construed by the St. Louis Court of Appeals of that state as limited to a sound-health clause policy (but never so limited by the Missouri Supreme Court), is not controlling on lawyers or on the Federal Court of Appeals, which is *only bound* by the *pronouncements of the State Supreme Court and not by its Courts of Appeal,* and but accentuates the fact that a legal question *was* involved in the equity case *about which lawyers might well differ.* Lawyers are still differing on that question and will continue to so differ until the Supreme Court of Missouri settles the point. Consequently the insurance company had a legal right to contest the question of its liability under this policy without being mulcted for damages and attorneys' fees in so doing. The decision of the Court of Appeals that, despite the existence of this controversial law point, it was *not* error to submit the issue of vexatious delay to the jury, is directly in conflict with the controlling decisions of the Missouri Supreme Court.

That Court said, in State ex rel. Gott v. Fidelity & Deposit Co., 317 Mo. 1078, l. c. 1095:

> "The *legal questions* raised by the respondent's position were such that lawyers might well differ, honestly and reasonably, thereon. *In these circumstances, it was error to submit the question of vexatious delay.*"

This question of "knowledge" of the falsity of the representation was the principal law point in the equity case.

The case was decided upon another ground not raised prior to the appeal in that case, but the Court recognized that the point would have been before it for decision had not the case been disposed of on other grounds. The Court said in the equity case, 97 F. (2d) 896, l. c. 899:

> "In this view of the case it is unnecessary to decide the question of whether under the Missouri law an innocent misrepresentation in an application for life insurance is sufficient to avoid the policy."

Now, this law point was formally recognized by the lower court as contended for by this petitioner in the equity case appeal and was recognized by the Court of Appeals in that case as being in the case for decision except for the disposition of the case on other grounds. It was a question about which not only lawyers might well differ, but likewise the courts.

Now, who can justly determine what a law point really is but the *Court,* who is a trained lawyer? And who but the Court can justly determine whether a law point is one about which lawyers might well differ? These are matters which are entirely outside the province of jurymen. Such determination is solely within the field of trained legal minds. And once the Court has determined, as it did here, that there was a debatable legal question involved, the issue of "vexatious refusal" *eo instanter* ceased to be one for the jury.

We submit, therefore, that the decision of the Court of Appeals in recognizing, as the lower court recognized, that there was a debatable question of law involved, but which nevertheless sustained the submission of the issue of "vexatious refusal" to the jury, failed to follow controlling Missouri decisions.

Failure to follow and apply the controlling decisions of the state court is recognized by this Court as a ground for

issuance of the writ of certiorari, to the end that the error may be corrected, and to the end that the doctrine of this Court as announced in Erie R. R. v. Tompkins, 304 U. S. 64, and Ruhlin v. New York Life Insurance Co., 304 U. S. 202, may be preserved and applied.

On this the Court has recently spoken in Lyon v. Mutual Ben. H. & A. Co., 305 U. S. 484, and Wichita Royalty Co. v. City Natl. Bank, 306 U. S. 103.

We submit, therefore, that the Court of Appeals was in error in sustaining the District Court in submitting the case to the jury on the issue of vexatious refusal to pay and in failing and refusing to reverse the case, because under the undisputed facts there was no vexatious refusal *as a matter of law,* under the controlling Missouri decisions.

We submit, in conclusion, that this case calls for the exercise by this Court of its supervisory power, and to that end that a writ of certiorari be granted so that this Court may review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

JAMES C. JONES,
JAMES C. JONES, JR.,
Counsel for Petitioner,
New York Life Insurance Company.

LOUIS H. COOKE,
VINCENT L. BOISAUBIN,
Of Counsel.